STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

LARRY A. SPEET; and S'TEL GROUP, LLC,

Plaintiffs/Counter-Defendants,

vs.

SINTEL, INC., a Michigan corporation,

Defendant/Counter-Plaintiff.
_____/

Case No. 12-09225-CKB

HON. CHRISTOPHER P. YATES

ORDER REGARDING DEFENDANT'S FAILURE TO APPEAR FOR SETTLEMENT CONFERENCE

On December 30, 2013, the Court issued a "Notice to Appear" on the electronic-filing system, which notified the parties of a settlement conference to be held on March 10, 2014, at 3:00 p.m. At the scheduled time, Plaintiff Larry Speet, in his individual capacity and as a representative of S'Tel Group, LLC, appeared with counsel, but Defendant Sintel, Inc. ("Sintel") sent neither a representative nor an attorney to court that day. Therefore, the Court directed Sintel to show cause why the Court should not dismiss Sintel's counterclaims and enter a default as to liability on the plaintiffs' claims. See MCR 2.401(G)(1).

In anticipation of the show-cause hearing, Defendant Sintel filed a memorandum regarding its failure to appear at the settlement conference. In that memorandum, Attorney Matthew S. Disbrow took full responsibility for his and his client's failure to appear. Attorney Disbrow explained that he had left his old law firm, Honigman Miller Schwartz and Cohn LLP ("Honigman Miller"), on December 30, 2013 – the date that the notice to appear was electronically filed – and that he had thereafter filed a new appearance on behalf of Jackson Lewis P.C. ("Jackson Lewis") on February 3, 2014. Attorney Disbrow

acknowledged that he was well aware of the upcoming settlement conference, but in the course of transferring the file from Honigman Miller to Jackson Lewis, he simply placed the wrong date for the settlement conference on his calendar. Accordingly, Attorney Disbrow and his client failed to appear on March 10, 2014.[1]

Under MCR 2.401(G)(1), "[f]ailure of a party or the party's attorney or other representative to attend a scheduled conference or to have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement, as directed by the court, may constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B)." Indeed, the Court's notice to appear included the following provision:

IMPORTANT: READ THIS CAREFULLY

> **"ALL PARTIES ARE TO APPEAR WITH THEIR COUNSEL AND, IN THOSE CASES WITH INSURANCE COVERAGE, AN INSURANCE COMPANY REPRESENTATIVE AUTHORIZED TO ENGAGE IN MEANINGFUL SETTLEMENT NEGOTIATIONS. NOTE: FAILURE TO ATTEND THIS CONFERENCE WILL LIKELY RESULT IN A DEFAULT OR DISMISSAL OF THIS CASE PURSUANT TO MCR 2.401 (G)(1)."**

Thus, the Court notified Defendant Sintel and its counsel of the importance of attending the settlement conference and the sanctions that could result from their failure to attend.

Before 2003, MCR 2.401(G)(1) prescribed a harsh, ironclad response to the failure of a party or its attorney to attend a scheduled conference, declaring that such a transgression "constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B)." See Schell v Baker Furniture Co, 461 Mich 502, 507 (2000), quoting MCR 2.401(G). But our Supreme Court then elected to soften the rule in a 2003 amendment, providing that the "[f]ailure of a party or the party's attorney or other representative to attend a scheduled conference . . . *may* constitute a default to which MCR 2.603 is applicable or a ground for dismissal under MCR 2.504(B)." See MCR 2.401(G)(1) (emphasis added).

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[1] Attorney Kelsey Switzer also failed to appear for the settlement conference on March 10, 2014, but Attorney Switzer reasonably believed that Honigman Miller was no longer representing Sintel as of February 3, 2014, the date on which Attorney Disbrow filed his appearance on behalf of Jackson Lewis.

Indeed, a staff comment confirms that the "2003 amendments of MCR 2.401(G) and MCR 2.401(D)(3) de-emphasized the use of defaults as sanctions for a party's failure to comply fully with an order." Thus, the "amended rules allow for entry of a default, but tilt in favor of less drastic sanctions."

Even before the 2003 amendment of MCR 2.401(G)(1), our Court of Appeals held that although a court may enter a default or dismissal for a party's failure to attend a settlement conference, "dismissal, the harshest sanction, should be reserved for the most egregious violations of the court rules." Schell v Baker Furniture Co, 232 Mich App 470, 477 (1998), aff'd, 461 Mich 502 (2000). In this respect, both binding precedent and the language of MCR 2.401(G)(1) itself counsel caution in considering whether to impose the sanction of default or dismissal for the failure to attend a settlement conference. By its terms, MCR 2.401(G) suggests a preference for a more lenient sanction than default or dismissal:

> The court shall excuse a failure to attend a conference or to participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that
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> (a) entry of an order of default or dismissal would cause manifest injustice; or
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> (b) the failure was not due to the culpable negligence of the party or the party's attorney.

See MCR 2.401(G)(2). Attorney Disbrow contends that the failure to attend the settlement conference was a result of ordinary – rather than culpable – negligence, so the Court should impose a sanction other than dismissal of Defendant Sintel's counterclaims and entry of a default on the plaintiffs' claims.

Michigan law recognizes a distinction between gross, culpable negligence and ordinary, simple negligence. E.g., Radu v Herndon & Herndon Investigations, Inc, 302 Mich App 363, 382-383 (2013). In the criminal context, gross negligence "'means wantonness and disregard of the consequences which may ensue.'" People v Feezel, 486 Mich 184, 195 (2010). Similarly, interpreting MCR 2.401(G)(2)(b), our Court of Appeals has explained: "'Culpable negligence' refers to conduct that is willful, intentional, reckless, or done in bad faith, as opposed to that which is due to ordinary negligence or to an honest

mistake or to circumstances beyond one's control." Bear Creek Village Ass'n v Bajor, No 312346, slip op at 2 (Mich App Jan 16, 2014) (unpublished decision), citing Great Lakes Realty Corp v Peters, 336 Mich 325, 333-334 (1953).

Here, Attorney Disbrow has taken full responsibility for Defendant Sintel's failure to appear at the settlement conference. He has admitted that he received the notice to appear that was electronically filed on December 30, 2013, and that in the course of transferring this file from Honigman Miller to Jackson Lewis, he simply placed the wrong date on his calendar. This simple mistake was not a willful, intentional, or reckless act done in bad faith. Attorney Disbrow intended to participate in meaningful settlement negotiations and had been actively involved in this litigation for almost two years. See Schell, 232 Mich App at 477. Thus, the Court finds that the failure of Attorney Disbrow and Sintel to appear for the settlement conference on March 10, 2014, was not the result of culpable negligence, so the Court must "enter a just order other than one of default or dismissal[.]"[2] See MCR 2.401(G)(2).

Because MCR 2.401(G) contemplates a sanction other than dismissal or default, the Court must fashion a sanction that permits Defendant Sintel to contest the claims and counterclaims on their merits, but makes the plaintiffs and their attorney whole for the all of expenses and inconvenience they incurred in connection with the settlement conference scheduled for March 10, 2014. Thus, IT IS ORDERED that Sintel shall pay the plaintiffs for all reasonable attorney fees resulting from the preparation for, and attendance at, the settlement conference on March 10, 2014, and all reasonable attorney fees incurred

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[2] As the plaintiffs have pointed out, the Court previously denied a motion to set aside a default entered by the Honorable Paul J. Sullivan for the defendants' failure to attend a settlement conference. See Quality Truck Co v Worldwide Truck Sales, Inc, 17th Circuit Court No 12-11618-CZB. In that case, the defendants argued that the default should be set aside because the failure to appear was a result of a mere scheduling error. The Court could not set aside that default, however, because a mere scheduling error does not rise to the level of good cause required to set aside a default under MCR 2.603(D). See Shawl v Spence Bros, Inc, 280 Mich App 213, 223 (2008) ("[T]he negligence of either the attorney or the litigant is not normally grounds for setting aside a default regularly entered."). Here, the standard being applied is much different because no judicial officer has entered a default.

in preparing for, and participating in, the show-cause hearing on March 24, 2014. Also, the Court shall entertain a request from Plaintiff Larry Speet for travel expenses and lost income that resulted from his attendance at the settlement conference on March 10, 2014, and the show-cause hearing on March 24, 2014.

IT IS SO ORDERED.

Dated: April 1, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge